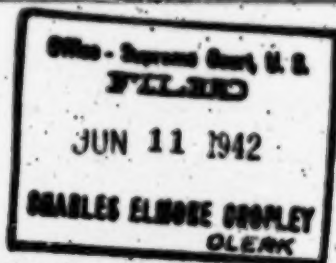


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation,
and HOWARD A. SWARTWOOD, Secretary,
Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United
States,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT**

HOWARD A. SWARTWOOD,
WILLIAM H. PRITCHARD,
Attorneys for Petitioners.

JOHN C. BRUTON,
Of Counsel.

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THE SECOND CIRCUIT**

Endicott Johnson Corporation and Howard A. Swartwood, Secretary, pray that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on May 22, 1942.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 298-332) is unreported as yet. Opinions of the United States District Court for the Northern District of New York (R. 55 and 278) are reported in 37 Fed. Supp. 604 and 40 Fed. Supp. 254, and orders thereon were entered February 19, 1941 and October 27, 1941.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered on May 22, 1942. Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The proceedings herein were instituted pursuant to the so-called Walsh-Healey Public Contracts Act (49 Stat. 2036, and hereinafter generally referred to as the Act), a full copy of which is printed as an appendix to this petition.

QUESTIONS PRESENTED

I. *Power*:—When an action is brought in a district court to enforce subpoenas *duces tecum* issued by an ad-

ministrative agency, does the district court have power to inquire into the coverage of the Act, when that is put in issue, or must it enforce the subpoenas merely on the allegation by the administrative agency that the Act applies?

II. *Coverage*:—The petitioner, Endicott Johnson Corporation, entered into contracts with the United States for the manufacture, in stated factories, of footwear; it also maintains separate and distinct plants for the tanning of leather, the manufacture of rubber heels, rubber soles, cut soles, counters and cartons. Are these latter plants subject to the Act, which relates solely to petitioner's contracts to manufacture footwear?

STATEMENT

Between 1936 and 1938 Endicott Johnson Corporation entered into fifteen contracts with the United States for the manufacture and sale of footwear (R. 2, 3, 12). These contracts were all for over \$10,000 and contained the stipulation or representation* concerning wages, hours of labor and working conditions called for by the Act (R. 172, 173). The Corporation was required to name, as to each contract, the factory where the footwear sold thereby was to be manufactured. The footwear factories, where the

*The entire stipulation or representation appears in Section 1 of the Act, pages 21 and 22, *infra*.

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footwear called for by these contracts was manufactured, are located in Binghamton, N. Y. and Johnson City, N. Y. The Government Contracting Officer maintained an inspector in each of these factories for the inspection of materials and finished footwear. However, in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons no inspector was maintained and those plants were not named (R. 177). Further, the articles described by the specifications in the footwear contracts did not include articles produced in the defendant's tanneries, rubber mills and sole-cutting factories and counter and carton departments (R. 16, 17, 18).

After these contracts had all been performed, the Department of Labor commenced a proceeding against Endicott Johnson Corporation, claiming that in performing its contracts with the United States, it had not complied with the Act in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons. It was claimed that the Act applied to those plants and factories, as well as to the manufacture of footwear, even though the acting administrator of the Act had ruled, concurrently, in a similar situation, that the manufacture of articles to be used in the finished product was not part of the manufacture of the finished product (R. 50, 51, 52).

On December 7, 1939 the Department served in the proceeding the subpoenas *duces tecum* involved herein. These subpoenas called for the production of "all time cards, time

books, employees' wage statements and payroll records, showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation", in certain factories and departments during various periods between October 26, 1936 and October 11, 1938. The petitioners willingly furnished the information as to the footwear factories, but refused to produce the records as to the tanning of leather, etc. on the ground that those factories are not covered by the Act.

On January 15, 1940 an action to enforce the subpoenas, under Section 5 of the Act, was commenced in the District Court for the Northern District of New York. The complaint or application, by which this proceeding was begun, alleged that the Secretary "has reason to believe" that the Act covers the operations of the defendant corporation in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 5, Par. 9). In its answer the defendant corporation denied that the Act covered the factories and plants in question (R. 13, Par. Ninth). On June 26, 1940 the Secretary moved for a judgment upon the pleadings, for summary judgment, or for an order enforcing the subpoenas (R. 36). The motions for judgment on the pleadings and for summary judgment were denied and the District Court set the matter down for a hearing on the issue of whether the Act applies to the operations of the corporate defendant in the manufacture of leather, rubber

heels, rubber soles, cut soles, counters and cartons (R. 63-65).

The Secretary then amended her complaint to allege without qualification that the Act applies to the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons and renewed her motions for summary judgment and for judgment on the pleadings (R. 65-67). In April, 1941 a hearing was held before the District Court on the issue of the coverage of the Act. The District Court found that on the evidence on this issue the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons was not a part of the manufacture of footwear and that accordingly the Act does not apply to those operations of the corporate defendant (R. 278-284). On October 27, 1941 a final order was entered which denied the Secretary's motions and dismissed her complaint and application.

On appeal to the United States Circuit Court of Appeals for the Second Circuit it was held that these subpoenas *duces tecum* should be enforced on the pleadings. It was held that if the complaint contains an allegation of coverage, though it be denied, a hearing on that issue should not be held, as the District Court has no power to inquire into the coverage of the Act; that if it is alleged that the Act applies, the subpoenas *duces tecum* must be enforced without further question (R. 298-332).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court must enforce the subpoenas *duces tecum* on the mere allegation in the complaint that the Secretary has reason to believe that the Act applies to the operations of the defendant in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons, even though such allegation be denied in the answer.

2. In holding that the District Court must enforce the subpoenas *duces tecum* on the allegation, though it be denied, that the Act applies to the operations of the defendant in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons.

3. In holding that a hearing should not be held to determine the applicability of the Act in a proceeding in the District Court brought to enforce subpoenas *duces tecum*, even though the applicability of the Act is in issue in the action.

4. In reversing the decrees of the District Court.

REASONS FOR GRANTING THE WRIT

As we show below, the opinion of the Circuit Court of Appeals decides a question of great public importance directly contrary to opinions of this Court and to opinions of other circuit courts of appeal.

(1) The Circuit Court of Appeals for the Second Circuit has decided a question of far-reaching public importance affecting procedure in all administrative tribunals and in United States District Courts. The Court has held that when an administrative agency commences a proceeding to enforce subpoenas *duces tecum*, the District Court has no power to inquire into the coverage of the Act, but must enforce these subpoenas willy nilly, upon the mere allegation of the administrative agency that the Act applies to the defendant.

If the Act does not apply to the defendant the administrative agency charged with its enforcement obviously has no jurisdiction under it. Accordingly, the decision of the Circuit Court means that the question of jurisdiction cannot be determined judicially when a proceeding is brought against the administrative defendant to compel it to produce records or witnesses in the administrative proceeding. Undoubtedly lack of jurisdiction or absence of coverage cannot be used as a sword to enjoin the proposed or pending proceeding but it certainly should be available as a

shield when judicial proceedings are brought against it to compel compliance with an administrative subpoena.

The subpoenaed material concededly was not directed to ascertain whether in fact those plants came under the Act. It was solely to determine damages on the assumption that the plants were covered by the Act.

If administrative subpoenas must be enforced by the Courts regardless of alleged lack of jurisdiction in the administrative agency issuing the subpoenas, there is no protection to the defendant against unreasonable search and seizure. If the Act does not apply, the administrative agency is acting without one scintilla of authority and since it is acting outside of the law it should not be permitted to call upon a federal court to give it aid by enforcing the subpoenas which it is empowered to issue, but not to enforce.

If Congress intended to make the enforcement of subpoenas an administrative act and not a judicial one, why does it provide for the enforcement of subpoenas in district courts? Certainly, if Congress intended that a mere allegation of the administrative agency that the Act applies to the defendant is sufficient for the enforcement of the subpoenas, it would have given that power to the administrative agency itself (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485 (1894) where the Court said that authority to enforce a subpoena "can only be asserted, under the law of the land, by a competent judi-

cial tribunal having jurisdiction in the premises."'). The requirement that subpoenas can only be enforced in a district court implies clearly that the enforcement of the subpoenas is intended to be a judicial act and therefore that the coverage of the Act which alone gives the agency jurisdiction, is to be judicially determined *in limine*. If it were otherwise Congress would have given the administrative agency authority to enforce its own subpoenas. Indeed, under the opinion of the Circuit Court of Appeals, Section 5 of the Act, and all other laws which impose the duty on courts to enforce administrative subpoenas, may well be unconstitutional as imposing a non-judicial function upon a court. *Interstate Commerce Commission v. Brinson*, *supra*.

(2) The opinion of the Circuit Court of Appeals for the Second Circuit does not comply with and in fact is directly contrary to opinions of this Court. The opinion does not refer to the case of *Interstate Commerce Commission v. Brinson*, 154 U. S. 447 (1894). However, the holding of this Court in that case is directly opposed to the holding of the Circuit Court of Appeals. There, the Interstate Commerce Commission petitioned the lower court for an order enforcing a subpoena pursuant to Section 12 of the Interstate Commerce Act, as amended (26 Stat. 743). The defendants contended, among other things, that the Act was unconstitutional in that it delegated legislative acts (enforcement of administrative subpoenas) to courts. The

contention was denied by this Court and it was held that the enforcement of such subpoenas is a judicial act. The Court said at 479:

"Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits."

Under that case, where it is claimed that the matter under investigation by the Commission is not authorized by the law, that issue must be determined by a court before the subpoenas are enforced.

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908) this Court held that certain questions asked a witness in a proceeding before the Interstate Com-

merce Commission were improper and need not be answered. In *Ellis v. Interstate Commerce Commission*, 237 U. S. 434 (1915) this Court again held that as to a company not subject to the jurisdiction of the Commission questions could be asked in a proceeding before that body only if they related to the issue of whether the Company was being used secretly as a device for evading Commission jurisdiction. In both cases, therefore, the Court passed upon the coverage of the Act, the jurisdiction of the Commission and the validity of evidence while the proceedings were pending before an administrative agency.

In *Jones v. Securities and Exchange Commission*, 298 U. S. 1, this Court held that the validity of proceedings before the Securities and Exchange Commission could be raised when the Commission sought to enforce subpoenas issued in that proceeding. In both *Myers v. Bethlehem Steel Corporation*, 303 U. S. 41 and *Federal Power Commission v. Edison Co.*, 304 U. S. 375, this Court stated, in effect, that if an administrative agency applied to a court for enforcement of a subpoena "appropriate defense may be made". The opinion of the Circuit Court of Appeals in the case at bar interprets these statements to mean only that "there could be no enforcement of the subpoena if the administrative proceeding had, in some manner, been ended" (R. 317). The Circuit Court has therefore very narrowly construed the language of this Court and held that "appropriate defense" means only that the administra-

tive proceeding has been ended. Such a confinement of this Court's language is not justified. It is directly contrary to the holdings of this Court in the *Ellis* and *Harri-*
man cases, *supra*.

Further, in *Interstate Commerce Commission v. Brim-*
son, *supra*, at page 485, this Court said:

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

See also *Federal Trade Commission v. Claire Furnace Co.*,
274 U. S. 160 (1927).

The justification which the Circuit Court used for departing from the holdings of this Court is that its decision is more in conformity with the "trend" of this Court's recent decisions concerning administrative bodies. The opinion says:

"Almost three decades have elapsed since the *Ellis* case, and more than three since *Harri-*
man. We cannot blind ourselves to the obvious fact that, in

that interval, the extension of administrative activities has increasingly brought to the attention of the Supreme Court the problems of the role of administrative bodies in our governmental setup, with a resultant evolution of a new judicial attitude as to their relation to the courts: * * * (R. 311).

And also—

“Such changes in the ‘climate of opinion’ (to use a revived meteorological metaphor) should make us wary of now utilizing the latent and inarticulate major premise, which may be said to underlie such older cases as *Ellis* and *Harriman*, as a basis for current decisions of doctrines relative to judicial review, or preview, of the administrative determinations.” (R. 312-313).

However, if there is to be any change in the opinion of this Court this Court itself should make such change, not the Circuit Court of Appeals. Furthermore, while there may have been a recent tendency in this Court to strengthen the fact findings and procedure in administrative agencies, the opinions of this Court have never changed fundamental principles of law such as are involved in the case at bar.

(3) The opinion of the Circuit Court of Appeals is directly contrary to recent opinions of other circuit courts. In *Goodyear Tire & Rubber Co. v. National Labor Relo-*

tions Board, 122 Fed. (2d) 450 (C. C. A. Sixth, 1941), *Cudahy Packing Co. v. National Labor Relations Board*, 117 Fed. (2d) 692 (C. C. A. Tenth, 1941) and *General Tobacco & Grocery Co. v. Fleming*, 125 Fed. (2d) 596 (C. C. A. Sixth, 1942), the Circuit Courts of Appeal held that before administrative subpoenas should be enforced the District Court must find whether the Act applied to the defendant and whether the Act is constitutional, if those points are put in issue by the answer. In the *General Tobacco & Grocery Co.* case, *supra*, the Court said, at page 599:

"An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In *Bradley Lumber Co. v. National Labor Relations Board*, 84 Fed. (2d) 97, 100 (C. C. A. Fifth, 1936) certiorari denied 299 U. S. 559, the Court said:

"The appellants can have a recognition of all their just rights under the scheme of procedure set up by

the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation."

In *Cudahy Packing Co. v. Fleming*, 122 Fed. (2d) 1005 (C. C. A. Eighth, 1941) it was held that a subpoena should be enforced which called for records of a plant engaged solely in intrastate commerce. In this case, however, it appeared that the defendant also had a plant engaged principally in interstate commerce and it was contended by the administrative agency that some of the employees in the plant engaged solely in intrastate commerce were concerned with the goods manufactured in the interstate commerce plant. In other words, there was a mixture of employees and the administrative agency could not decide which employees came within its jurisdiction and which did not, without the records of both plants. The opinion of the Court contains no language which would indicate that the subpoena should be enforced wholly apart from, and without consideration to, the applicability of the statute.

Accordingly, the opinion of the Circuit Court of Appeals in the case at bar is entirely without precedent and

is directly contrary to the holdings of the other Circuit Courts of Appeal.*

(4) The opinion of the Circuit Court of Appeals provides a rule of law in the Second Circuit which is contrary to its own prior opinion in *E. I. duPont de Nemours & Co. v. Boland*, 85 Fed. (2d) 12 (C. C. A. Second, 1936). In that case the Court said:

"Appellants' right to contest the examination of records or the compulsion of testimony may be asserted when application is made to enforce a subpoena. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 47 S. Ct. 553, 71 L. Ed. 978; *Federal Trade Commission v. Maynard Coal Co.*, 57 App. D. C. 297, 22 F. (2d) 873" (p. 15).

The opinion of the Circuit Court in the case at bar will reduce district courts to mere automatons whenever they are requested to enforce a subpoena issued by an administrative agency. Under this decision, which it is sought to have reviewed, the district courts can only inquire, if it is put in issue, whether the administrative proceedings are

*There are several opinions of the district courts which are contrary to the decision of the Circuit Court of Appeals in the instant case. These opinions include *National Labor Relations Board v. New England Transportation Co.*, 14 Fed. Supp. 497, *Securities and Exchange Commission v. Tung Corporation*, 32 Fed. Supp. 371, *Gates v. Graham Ice Cream Co.*, 31 Fed. Supp. 854.

still pending. If the administrative proceedings are pending the District Court must enforce the subpoena merely on the complaint or allegation of the administrative agency. The administrative agency would, of course, not allege that the administrative proceeding has ended nor would it allege that the act under which the proceedings are brought is unconstitutional or anything else which would or might prejudice the administrative agency.* The answer will assert any defense to the enforcement of the subpoenas available to the administrative defendant. Unless the answer

*The opinion of the Circuit Court says:

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena. And the same result would follow if an administrative order for hearing under the Walsh-Healey Act, or the plaintiff's pleadings in the subpoena suit, explicitly stated (1) that the defendant was not a contractor with the government, or (2) that the contract did not contain the required statutory stipulations, or (3) that the contract was of a kind explicitly excluded by §9, from the operations of the Act." (R. 328).

It is unthinkable, of course, that a complaint would contain such a statement or admission.

asserts that the administrative proceeding is ended, under the opinion of the Circuit Court of Appeals the District Court has no power to hold a hearing or to inquire into the issues raised by the pleadings. This is contrary to judicial practice and to our judicial system. A proceeding in the District Court to enforce a subpoena is an entirely independent case. If the Court has no power to hold a hearing on the issues tendered by the pleadings, the case loses its status as a judicial cause and makes a mockery of the Court and of the entire proceeding.

(5) The Circuit Court of Appeals acted arbitrarily and entirely without authority in reversing the District Court. The evidence before the District Court showed conclusively (in fact there was no contrary evidence) that the leather, rubber heels, rubber soles, cut soles, counters and cartons were not made for government use and were selected at the completion of their manufacture. The Department of Labor has itself ruled that where material is made for stock and not for the performance of government contracts it is not covered by the Act. The Circuit Court of Appeals, therefore, acted arbitrarily in reversing the opinion of the District Court in holding that the plants in question of the corporate defendant are not covered by the Act.

CONCLUSION

Because of the importance of the questions presented and because of the failure of the Circuit Court of Appeals for the Second Circuit to give proper effect to the applicable decisions of this Court and for the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

JOHN C. BRUTON,
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June, 1942.

APPENDIX

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equip-

ment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor, will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of

money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such

other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United

States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be at least one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making

appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes" approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the re-

mainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.